Supreme Court, U.S.
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No. 96-324

In The

Supreme Court of the United States

October Term, 1995

JOHNSIE RILEY, et al.,

Petitioners,

v.

DAVID H. MURDOCK, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT MURDOCK'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

All parties to the proceeding in the Court of Appeals are identified in the caption. Respondent David H. Murdock, who is the only respondent before this Court, is a natural person, and therefore no statement of parent or subsidiary companies is necessary or appropriate under Supreme Court Rule 29.6.

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RESPONDENT MURDOCK'S BRIEF IN OPPOSITION

Respondent David H. Murdock ("Murdock") respectfully requests that the Court deny the Petition For Writ Of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

STATEMENT OF THE CASE

Petitioners (hereinafter "Plaintiffs") list the supposed "facts" which they say were sufficient to create a "triable issue" as to whether Murdock "conduct[ed] an inadequate investigation and select[ed] an inappropriate carrier" to provide the annuity upon termination of the Cannon Plan. Petition at 3. In every case, these purported "facts" are based on a distortion or an outright misrepresentation of the record. The following discussion of the most prominent of Plaintiffs' assertions demonstrates the manifest correctness of the District Court's conclusion, unanimously affirmed *per curiam* by the Fourth Circuit, that the record does not support Plaintiffs' rhetoric.

- When Executive Life was placed in receivership in 1981, "Plan participants' retirement benefits were immediately slashed by 30 percent." Petition at 2-3.

There is no dispute that this was a temporary shortfall which was promptly made up. JA 1054.[1] Every Plaintiff testified that they have received every dollar of benefits to which they are entitled. JA 1478-80, 1491, 1723-26, 1735.

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[1] References are to the Joint Appendix which was filed with the Fourth Circuit.

- A.M. Best reported negative information about Executive Life, including that its reserves were likely underestimated and that it was ranked as only a Class IX insurer, citing JA 456-58. Petition at 4.

The record is undisputed that in making this assertion, Plaintiffs' expert was relying on the *1986* Best report, JA 456, which was not issued until July, 1986, and which therefore could not have been available to Murdock and the Committee when they were conducting the selection process in April through June. Murdock and the Committee had access to the *1985* Best report, JA 1001, which gave Executive Life a rating of A+, Best's highest rating, and placed it in Class XV, Best's largest size category.

- "Murdock knew that the New York Commissioner of Insurance had disqualified Executive Life's parent company from doing business in New York. (JA 1639)." Petition at 4.

The record is again uncontradicted that the first public knowledge of any adverse action by the New York Department of Insurance was in 1987. Indeed, Plaintiffs' own expert prepared a report which indicates that the first public disclosure of any regulatory action in New York was on 4/29/87, JA 491, more than nine months *after* Murdock's decision to purchase an annuity from Executive Life.

- "The California Insurance Commissioner had determined that Executive Life was statutorily insolvent in 1984. (JA 300-332, 435, 456)." Petition at 4.

The reference is to a report by the California Department of Insurance as of year end 1983. JA 300. The report addressed a technical issue concerning how Executive Life accounts for the impact of reinsurance arrangements

on its statutory reserves, and concluded that they were not correctly reported under California law. JA 312-13. While this determination perhaps *could* have resulted in a disallowance of reinsurance credits which might have rendered Executive Life technically insolvent, in fact the California Department of Insurance took no such action. Executive Life agreed to "an orderly accounting transition acceptable to the Department," as a result of which the Department determined that "no reinsurance credits will be disallowed for purposes of this examination report." JA 314. In short, the undisputed record makes clear that this was purely a technical issue, and that Executive Life was never insolvent.

- "Hewitt Associates did not recommend purchasing an annuity from Executive Life, but instead provided a written report to Murdock's Investment Committee which expressed 'reservations' about Executive Life. . . . (JA 266, 267-270, 278-280, 1387-94, 1582-1583, 1588-89, 2043-45)." Petition at 5.

The record says only that Hewitt did not specifically recommend any *one* carrier over another, "in keeping with the usual practice of Hewitt." JA 2045. There is no dispute, however, that the Committee asked for a list of carriers that Hewitt would "recommend," JA 923, and Hewitt responded with a list of eleven "suggested carriers," including Executive Life. JA 933-34.

The so-called "reservations" were contained in a single four page memo, JA 267-270, prepared by an individual Hewitt analyst for another client. The memo began by discussing Executive Life's *strengths*, including at least eleven positive considerations about its stability, financial

strength, exceptional investment performance, and diversification. JA 267-68. Only then did the author of the memo note four "potential negatives" which were "worth monitoring." JA 268. Even those factors were tempered by positive comments. *See* JA 268-69 (noting, for example, that Executive Life's CEO had a reputation as a "gunslinger" in the 1960's, but stating, "His record [today] would indicate otherwise. He has run Executive Life since 1974 [for 12 years] and its record of growth is admirable."). Overall, the author was "reasonably comfortable" with recommending Executive Life. JA 267.

- "Publicly available information reviewed by Plaintiffs' expert" showed that "60-70% of Executive Life's total assets . . . consisted of junk bonds. . . . (JA 435-438. *See also* JA 457, 1373)." Petition at 3-4.

and

- "Murdock knew about the high proportion of junk bonds in Executive Life's portfolio . . . and understood that the risk associated with junk bonds made them an unsuitable investment for 'a pension plan for widows and orphans.' (JA 1601-02, 1638-1640)." Petition at 4.

One expert for Plaintiffs concluded that in 1985, "junk bonds comprised . . . 41.4 percent of all assets held" by Executive Life. JA 457. The "60-70%" number came from their other expert, but he claimed only that this was the percentage of Executive Life's assets which were "not rated investment grade." JA 435. That securities were not of the highest investment grade hardly means that they were "junk." Murdock testified that he and the Committee had carefully considered the issue, and did not believe that Executive Life held a high proportion of insecure investments:

> [Executive Life] had high yield bonds. I think of a junk bond as a bond that is just that, it has a very limited earning capacity and is way over leveraged. To say that all of the bonds that were held by Executive Life were junk bonds is an over statement. As time has proven, those so-called junk bonds have increased materially and are no longer considered junk bonds.

JA 1639-40. It was only in the context of that definition of "junk" bonds as over-leveraged with limited earning capacity, which excluded most of Executive Life's holdings, that Murdock said he "would not put any junk bonds into a pension plan for widows and orphans." JA 1638.

What Plaintiffs fail to even mention is that the Committee upon which Murdock relied thoroughly investigated this precise issue. The four members of the Committee had extensive experience in investment banking, financial analysis, and pension plan administration. JA 1430-33, 1897-1902, 1913-14, 1928, JA 1902, 1964-65, JA 1503-07, 1520, JA 1614, 1756-58. The Committee received written evaluations from Hewitt Associates, its expert consultant, as to each of the carriers in the final running, JA 1770, but did not rest on those evaluations. The Committee put together its own evaluation worksheets on each carrier, and gathered additional detailed financial information on several of the carriers, including Executive Life. JA 1767-68.

Two members of the Committee, Werner and Halpern, personally conducted an in-depth analysis of the investment portfolio of each carrier, and these two were

experts in this field. JA 1770. Werner testified that Executive Life's high-yield portfolio was "very diversified," with "between 700 or 800 different issuers." JA 1987. That diversification was a key reason why Executive Life's high yield portfolio was not believed to present undue risk. In addition, the portfolio was "very short-term," meaning that Executive Life was "not subject to the same kind of interest rate risk that a number of other insurance companies were." *Id.* As a result, the Committee reasonably concluded that Executive Life was in a better position to weather interest rate changes than the other bidding insurance companies, many of which were locked in to large long-term real estate holdings. *Id.*

It is significant that this conclusion by the Committee, that Executive Life was extremely well-managed, well-financed, and very secure, was confirmed by every expert assessment which Murdock and the Committee had available to them. For example, the analysis of Conning & Company dated February 18, 1986, JA 982-999, noted that the high-yield bond portfolio's "risk adjusted performance has been superior," JA 992, and recognized, as did the Committee, that the portfolio was both highly diversified and relatively short term, providing a "high degree of flexibility." JA 993. Together with "a debt-free balance sheet that is one of the strongest in the life insurance industry," JA 985, "conservative accounting practices," JA 986, and $6.9 billion in reserves, JA 987, the "largest component" of which were "very low risk," JA 989, these factors led Conning & Company to conclude that the company was "one of the best managed" life insurers in the United States. JA 985. *See also* JA 267-268

(Hewitt analysis which noted that Executive Life's portfolio had a short average maturity and was highly diversified, and concluded that it had "one of the strongest balance sheets in the industry" and "the best investment performance"); JA 290 (giving highest ratings, and concluding that Executive Life's "capital and surplus position in relation to overall insurance risk" is "significantly above that of the average life insurance company.").

Plaintiffs' assertion that Murdock and the Committee knew or should have concluded that Executive Life's portfolio was in any way "an unsuitable investment for a pension plan" is flatly contrary to the undisputed record.

- "Plaintiffs' well-qualified experts submitted reports which concluded that the selection of Executive Life was imprudent based upon publicly available information which a reasonable investigation would have revealed. (JA 432-499)." Petition at 5.

Plaintiffs' two experts, Cox and Babbel, certainly expressed the conclusory *opinion* that Murdock should have known Executive Life was insecure in 1986. The *evidence* upon which they purported to rely, however, supports no such inference, as the District Court recognized.

Cox's report, JA 453-475, identifies only two pieces of concrete adverse information relating to Executive Life which could have been available to the Committee prior to July, 1986. One was the California Department of Insurance report discussed *supra* at 2-3. The other consisted of Insurance Regulatory Information System ("IRIS") financial ratios compiled by the NAIC, which Cox claims "should have alerted the fiduciaries to possible default

risk," supposedly because Executive Life had four or more ratios outside the "normal ranges" from 1981 through 1983. JA 455-56. However, the record is undisputed that the NAIC itself, which defines the IRIS ratios and compiles them for all insurers, found no need to take any action with respect to Executive Life on this basis. *Id.*

It is telling that virtually all of the truly significant adverse events concerning Executive Life are discussed in Cox's report under the heading "Monitoring the Investment." *See* JA 459-460. None of these events had happened as of July 2, 1986, as Cox's report explicitly concedes. *Id.*

Babbel's report purported to list "public information that was readily available by July 2 of 1986," JA 434, but in terms of material adverse information which would have been available to the Committee, he identified nothing different than did Cox. *See* JA 451-52.[2] His deposition testimony confirms the hindsight nature of his analysis. For example, he testified to his opinion that Executive Life had inadequate reserves in mid-1986, but when

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[2] Other than articles in the popular press, most of which were far from critical (*e.g.*, a *Fortune* magazine article listing Executive Life among "America's Most Admired Corporations," JA 451), Babbel lists only Executive Life's public filings, and six "Miscellaneous" documents. *Id.* The six consist of the California Insurance Department report already discussed; A.M. Best Co. reports; two Conning & Company analyses written in July and December, 1986, which did not exist at the time of the Committee's selection process; and two private, unpublished letters by securities analysts to their clients, as to which there is no evidence that Murdock and the Committee ever knew of their existence or could have had any access to them.

asked if he would have estimated that *in 1986*, he responded, "I can't say." JA 1306. He also talked about the volatility of junk bonds, but admitted that the very first working paper on the subject did not come out until 1986, and couldn't say whether it was before or after July of that year. JA 1307-08.

The Plaintiffs' experts simply failed to identify any material information which was available to Murdock and the Committee, and which would have in any way changed their reasonable determination that Executive Life would provide a safe and secure annuity.

- Murdock chose "an annuity carrier on the basis of price in order to maximize his own reversion," citing several record references. Petition at 5-7.

None of the evidence cited by the Plaintiffs in support of this assertion indicates, or even implies, that Murdock or the Committee in any way compromised the interests of Plan participants in order to obtain a lower-priced annuity. To the contrary, the evidence is undisputed that in the first round of bidding, Executive Life's bid came in more than two million dollars less than the next lowest bidder, and if Murdock and the Committee had been price shopping, they could have simply accepted that bid without further question. JA 1981-83.

They did not do that. Instead, they went back to Executive Life as well as to the other carriers in the bidding, making sure that each had correctly analyzed the data, and refining some of the bid specifications. The result was that Executive Life's bid in the next round went up by more than two million dollars, and was only $500,000 less than the next lowest bidder. *Id.*; JA 952. That

is hardly the behavior of one simply choosing on the basis of price.

The "evidence" relied on by Plaintiffs to the contrary falls into two categories. First, there is conclusory testimony from their experts that because surplus plan assets were to revert to Murdock, by definition a lower priced annuity would increase the size of the reversion, giving rise to what Plaintiffs' experts called an inherent conflict of interest on the part of Murdock and his employees and consultants. *See, e.g.*, JA 461, 1374-76. This sort of theoretical "conflict" is present in every termination of a plan with surplus assets, of course. In fact, there is no real conflict because it is clearly in the long term interest of the plan sponsor to be certain to obtain a safe annuity provider, in order to avoid later repercussions. *See* JA 1566.

The second kind of evidence relied on by Plaintiffs is evidence that, *after* the thorough and meticulous investigation of each candidate by the Committee, and after it had assured itself that all of the potential annuity providers were sound, safe and capable, price then became one factor upon which the choice between the remaining excellent candidates was made. The mere fact that price was a consideration in no way establishes, however, that price was an *inappropriate* consideration. The testimony was universal and undisputed that throughout the process, the Committee and Murdock had *three* critical criteria in mind: the financial stability of the insurance company, the ability of the company to administer the annuity, and the price. JA 955-80, 1693-95, 1698, 1969-71, 1979-81, 1994-2000. Since, in the last round of bidding, the

difference between Executive Life's bid and the next lowest bidder was less than one-half of one percent of the bid, JA 952, price obviously was not a significant consideration.

* * *

The point of this factual summary is not to attempt to establish that there was no negative information about Executive Life. The point, rather, is that the evidence is uncontradicted that Murdock and the Committee did exactly what ERISA fiduciaries are supposed to do: they conducted a thorough and careful investigation, they obtained all the information they could on all the annuity providers, they analyzed that information and actively considered the positives and negatives about each candidate, and they made a reasonable and prudent decision based on all the information available. The District Court was correct as a matter of law in determining that this course of conduct, about which there can be no reasonable dispute, was consistent with the duties of fiduciaries under ERISA.

SUMMARY OF THE ARGUMENT

The attempt by Plaintiffs to portray the decision below as in conflict with decisions by other federal circuits fails. The Fourth Circuit opinion, and that of the District Court which it approves, is completely consistent with the law in other circuits regarding the nature of a fiduciary's legal obligations under ERISA. The Fourth Circuit correctly reached a different outcome than that of recent Third and Ninth Circuit cases only because the

same legal standards were applied to radically different fact situations.

The material facts concerning Murdock's conduct as a fiduciary are undisputed, including the qualifications of the Committee on which he relied, the diligent investigation they conducted, and the facts which were reasonably available to the Committee as of the time the selection of an annuity provider was made. The District Court applied the settled legal standards of fiduciary conduct under ERISA to these undisputed facts, and properly found that no breach of fiduciary duty could be shown. Plaintiffs cannot defeat summary judgment simply by reliance on unsupported and conclusory expert opinions to the contrary.

The Fourth Circuit was not bound to apply the Department of Labor's ("DOL") current interpretation of ERISA fiduciary obligations to conduct which took place ten years earlier. Whatever the ongoing validity of the DOL interpretation may be, the Fourth Circuit rightly held that it was not properly applicable to Murdock with respect to action he took in 1986, when the DOL had never even thought of the "safest available annuity" approach.

This case is in any event inappropriate for certiorari because Murdock has preserved a substantial *res judicata* defense which could preclude this Court from ever reaching the merits.

REASONS FOR DENYING THE WRIT

An experienced trial judge, affirmed by a unanimous Court of Appeals, carefully scrutinized the record made by Plaintiffs in this case, and, applying well-established and uncontroversial principles of ERISA law, concluded that the evidence does not create a triable issue of breach of fiduciary duty under ERISA. Plaintiffs now attempt to transform this unremarkable result into a basis for this Court to exercise its extraordinary certiorari powers through two devices.

First, Plaintiffs assert that, because the Third and Ninth Circuits have recently decided cases involving Executive Life in which summary judgment was not appropriate, the decision that summary judgment is appropriate in this case must necessarily be in conflict. Second, they argue that the issuance of summary judgment here was so severe a departure from the accepted and usual course of proceedings as to require the exercise of this Court's supervisory powers. Neither argument has any substance, and both are simply efforts to induce this Court to re-weigh yet again a factual record which was meticulously examined by the courts below.

I. The Opinion Below Creates No Conflict Among The Circuits.

Plaintiffs contend primarily that the decision below conflicts with *In re Unisys Savings Plan Litigation*, 74 F.3d 420, *reh'g denied*, 74 F.3d 433 (3d Cir.), *petition for cert. filed*, No. 95-1808 (May 6, 1996) ("*Unisys*") and *Pilkington PLC v. Perlman*, 72 F.3d 1396 (9th Cir. 1995) ("*Pilkington*"). The opinion of the District Court below as adopted by the

Fourth Circuit, however, applies exactly the same legal principles and standards as those announced in *Unisys* and *Pilkington*. The different outcomes are the result of dramatic differences in the respective factual records.

A. The Decision Below Applied The Same Settled Legal Principles As Are Recognized In *Unisys*, But To A Different Factual Record.

The Third Circuit in *Unisys* held that the duty of prudence under ERISA is properly evaluated

> according to an objective standard, focusing on a fiduciary's conduct in arriving at an investment decision, not on its results, and asking whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment. (Citations omitted)

74 F.3d at 436. The District Court below applied precisely these same principles:

> Courts have articulated two ways in which to measure a fiduciary's use of prudence in carrying out their duties. The first is whether the fiduciary employed the appropriate methods to diligently investigate the transaction and the second is whether the decision ultimately made was reasonable based on the information resulting from the investigation. *See Schaefer v. Arkansas Medical Sos.*, 853 F.2d 1487 (8th Cir. 1988); *Donovan v. Mazzola*, 716 F.2d 1226 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040, 104 S.Ct. 704, 79 L.Ed.2d 169 (1984); *Bidwell v. Garvey*, 743 F.Supp. 393 (D. Md. 1990).

Appendix to Petition For Writ Of Certiorari (hereinafter cited as "App.") at 32-33.

Plaintiffs have not and cannot identify any meaningful difference between what the Third Circuit and the Fourth Circuit understand to be the fiduciary duties under ERISA. All they can point to is a different result in the two cases, a difference that is not only unremarkable but unavoidable in light of the radically different nature of the facts before the two courts. The following discussion highlights some of the more significant factual differences.

1. The Committee Conducted The Independent Investigation Missing In *Unisys*.

The Third Circuit's denial of summary judgment resulted not because the Unisys fiduciaries turned out to be wrong, but because there was evidence that they had failed to conduct a proper investigation. The Third Circuit was particularly troubled by evidence that suggested that the fiduciaries did little or no independent analysis, but relied blindly on their outside consultant. It held that ERISA "requires fiduciaries to review the data a consultant gathers, to assess its significance and to supplement where necessary." 74 F.3d at 435.

In the present case, the evidence is undisputed that the Committee appointed by Murdock performed exactly the substantial independent investigation and analysis of Executive Life that the Third Circuit considered to be appropriate. Indeed, when the Committee received a written evaluation from Hewitt as to each of the carriers in the final running, it immediately went to work, putting together evaluation worksheets on each of the nine respondents to the original bid solicitation, gathering

additional detailed financial information, examining audited financial statements, public filings, Best reports, and all other public information they could obtain, and doing an in-depth analysis of each carrier's investment portfolio. *See supra* at 5-7.

This is precisely the detailed, independent investigation which the Third Circuit found lacking in *Unisys*, where the record showed that "Unisys's investigation consisted of nothing more than confirming that Executive Life's credit ratings had not changed since June, 1987." *Unisys*, 74 F.3d at 436.

2. The Negative Information Available To Unisys Fiduciaries Did Not Exist In 1986.

Recognizing that the "thoroughness of a fiduciary's investigation is measured not only by the actions it took in performing it, but by the facts that an adequate evaluation would have uncovered," 74 F.3d at 436, the Third Circuit held "that one who investigated Executive Life *in 1987 and 1988* would have found" that Executive Life's high ratings had been questioned or lowered, and that other warning signs had begun to surface. 74 F.3d at 436 (emphasis added).

Because the purchase of the Cannon annuity contract occurred on July 2, 1986, the Committee's investigation could have uncovered none of those facts that were significant to the Third Circuit. To the contrary, the record in this case shows that the publicly available ratings of Executive Life as of that time, not only from Best, but also by Standard & Poors' *Credit Week* and Conning & Co., were all very positive. JA 1000-1001, 982-999, 1975-76.

Virtually all negative ratings of Executive Life or adverse action by state regulatory authorities occurred after July 1986. *See supra* at 7-9.

3. The Fiduciaries In *Unisys* Failed To Follow The Recommendation Of Their Experts.

In *Unisys*, the outside consultants had recommended purchase of only a three-year GIC, but Unisys purchased one of five-years' duration to obtain a higher interest rate. Again, the Third Circuit criticized the lack of a responsible decision-making process, not the merits of decision. 74 F.3d at 437. In the instant case, there is no evidence that anything the Committee or Murdock did was inconsistent in any way with the recommendations, advice and information received from all the experts consulted.

4. The Bid Process In *Unisys* Was Improper.

The Third Circuit questioned whether the Unisys fiduciaries were "equipped to conduct GIC bids unassisted," which they did in their last two purchases, and whether it was prudent to do so without written guidelines. 74 F.3d at 437. In this case, of course, the bid process was properly conducted by independent experts pursuant to written guidelines.

5. The Purchase Of GICs In *Unisys* Involved A Continuing Duty To Monitor That Did Not Exist In This Case.

Unisys involved three separate purchases of GICs by an ongoing plan. In that context, the fiduciaries were under a continuing duty to monitor the investments and evaluate their reasonableness on an ongoing basis. By contrast, the present case concerned the purchase of a group annuity contract upon termination of a plan. ERISA imposes no continuing duty to monitor in such a situation. In fact, because the group annuity contract executed in 1986 was irrevocable and binding on both sides, JA 1027-39, Murdock would have been powerless to change the annuity provider regardless of what later "monitoring" might have revealed.

Under Plaintiffs' theory, Petition at 18, 33-34, one who terminated a plan and purchased an annuity to satisfy its obligations would have a perpetual responsibility thereafter to monitor the annuity provider and take some unspecified remedial steps if the company ever had financial problems. Neither *Unisys* nor any of the other cases cited by Plaintiffs so hold.

* * *

The record before the Third Circuit contained concrete evidence from which a reasonable fact finder could conclude that the Unisys fiduciaries failed to satisfy the duty of prudence. None of those facts are present here. It is that simple reality, not any conflict in the legal principles applied, which led to differing results which were appropriate in each case.

B. The Decision Below Is Consistent With That Of The Ninth Circuit In *Pilkington*.

Plaintiffs assert that the decision below conflicts with that of the Ninth Circuit in *Pilkington PLC v. Perlman*, 72 F.3d 1396 (9th Cir. 1995). Again, though, nothing suggests that the two courts were applying a different legal standard. The supposed "conflict" is nonexistent given the significant factual distinctions between the two cases.

1. The Bid Process In *Pilkington* Was Not Independent.

In *Pilkington*, Revlon, the plan sponsor, asked Executive Life to submit a price quote for the annuity *before* inviting bids from other carriers, and then made an advance deposit of $18 million toward the purchase of an Executive Life contract before the bidding process for other insurance carriers had even opened. 72 F.3d at 1397. Those extraordinary actions obviously signalled to the Ninth Circuit that the fiduciaries may not have acted with independence and objectivity.

The highly questionable behavior of the *Pilkington* fiduciaries contrasts dramatically with the conduct of the Committee in the instant case, where a genuinely independent and objective bid process was conducted by an outside consultant under the direction of fiduciaries other than Murdock.

2. Revlon Failed To Make An Independent Investigation Of The Insurance Companies.

The *Pilkington* decision suggests that Revlon relied blindly on the ratings from Best and Standard & Poors without doing any further investigation. The Ninth Circuit held that "[l]egal authority does not support [Revlon's] contention that a mere ratings scan satisfied their fiduciary duty of loyalty to the plan." 72 F.3d at 1401 (citations omitted). As the record cited above, *supra* at 5-7, makes abundantly clear, the Committee's thorough independent investigation of Executive Life in this case was precisely the behavior that was absent in *Pilkington*.

A fiduciary's careful investigation of a transaction, such as occurred in this case, is generally determinative of whether the fiduciary's decision was made for the exclusive purpose of benefiting plan participants. *See, e.g., Donovan v. Bierwirth*, 680 F.2d 263, 271-276 (2d Cir.), *cert. denied*, 459 U.S. 1069, 103 S.Ct. 488, 74 L.Ed.2d 631 (1982); *Anderson v. Mortell*, 722 F. Supp. 462, 470 (N.D. Ill. 1989); *Donovan v. Walton*, 609 F. Supp. 1221, 1244-46 (S.D.Fla. 1985), *affirmed*, 794 F.2d 586 (11th Cir. 1986). Its presence here, and absence in *Pilkington*, was obviously a determinative factor.

3. Executive Life's Bid In *Pilkington* Was Substantially Below All Other Bids.

Executive Life's bid on the Revlon annuity was $85 million, a tidy $13 million lower than the next lowest bid, which was a difference of some 15 percent. 72 F.3d at 1397. Not surprisingly, the Ninth Circuit held that such a dramatic price differential was enough to raise a triable

issue as to whether the selection of Executive Life was excessively motivated by price.

The undisputed facts make clear that such a motivation was absent here. *See supra* at 9-11. If the Committee had been price shopping, it could have simply jumped on Executive Life's bid in the first round, which was more than two million dollars less than the next lowest bidder, but the evidence is uncontroverted that it did not do so. The result was that in the second round of bidding, Executive Life's bid was lower than CIGNA's by only $500,000 on a total bid of approximately $78 million. JA 952.

Unlike the record in *Pilkington*, then, the undisputed facts here make clear that price was not a significant factor in the selection of the annuity provider.

4. The *Pilkington* Fiduciaries Had A Quid Pro Quo Relationship With Executive Life.

Revlon had a close relationship to Executive Life, because Executive Life had purchased a large amount of Revlon's own "junk bonds". 72 F.3d at 1402. The Ninth Circuit held that this evidence could lead a fact finder to conclude that Revlon did not have an arms-length relationship with Executive Life, and may have had actual knowledge that Executive Life's portfolio was insecure since Revlon obviously had inside knowledge of the insecurity of its own bonds. *Id.*

No such circumstances are present here. There is no evidence that Executive Life ever held any bonds issued by Murdock's companies.[3]

* * *

None of the facts that made summary judgment inappropriate in *Pilkington* are present in this case. The results in the two cases are entirely consistent, and present no appropriate ground for intervention by this Court.

C. The Fourth Circuit's Decision Does Not Conflict With Those Of Other Circuits In Any Other Respect.

1. The Selection Of Executive Life Did Not Violate The Diversification Requirement.

Plaintiffs contend that the District Court erred in failing to consider whether Murdock breached the duty of "diversifying the investments of the plan" under ERISA § 404(a)(1)(C). Petition at 17-18. They are half right. The District Court did not apply the diversification requirement, but it was completely correct in not doing so because that requirement applies only to an ongoing plan, not to the purchase of a group annuity contract for a terminated pension plan. *See, e.g.*, H.R. Conf. Rep. No. 1280, 93rd Cong., 2nd Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. at 5084-85; *Etter v. J. Pease Construction Co.*,

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[3] While there was some brief overlap in the extensive investment portfolios of Executive Life and Murdock's companies, the record shows that such common holdings were transitory and *de minimis*. JA 520, 521, 524, 535, 540, 509-18. There is no evidence that Murdock or anyone on the Committee was even aware of these holdings by Executive Life.

Inc., 963 F.2d 1005, 1010-11 (7th Cir. 1992), and cases discussed therein. Plaintiffs have not cited a single case or other authority to support the proposition that the diversification requirement applies in this context.

2. The Fourth Circuit's Decision Does Not Conflict With That Of Any Other Circuit Regarding Breach Of Fiduciary Duty Under ERISA.

Contrary to Plaintiffs' assertions, Petition at 18, the Fourth Circuit did not hold that fiduciaries who profit by a breach of fiduciary duty are not subject to liability if the plan beneficiaries do not suffer direct financial loss. The question of whether a fiduciary breach has caused loss to plan participants or profit to the breaching fiduciary is necessarily only reached once a breach of fiduciary duty has been established. The Fourth Circuit properly did not reach this issue because it concluded that there was no breach of fiduciary duty.

Plaintiffs also complain that the Fourth Circuit allowed the District Court to improperly "collapse" the duty of loyalty under ERISA into the duty of prudence. Petition at 16. Yet even Plaintiffs concede that the duty of prudence "may overlap" the duty of loyalty. *Id.* The District Court did no more than recognize that the facts of this case place it squarely in the overlap. *See* App. at 35. Given that the decision to purchase the annuity contract from Executive Life was prudent, as the record establishes, Plaintiffs have not even suggested any independent basis upon which Murdock could nonetheless have breached the duty of loyalty.

D. Conclusion With Respect To Alleged Breach Of Fiduciary Duty.

The decision to terminate the Plan was a permissible one; the process employed to select the insurer was an unimpeachable one; and Murdock's eminently reasonable and proper acceptance of the Committee's recommendation satisfied his fiduciary duties fully. The unforeseeable troubles of Executive Life five years after the fact, troubles which to this day have not resulted in the loss of a single dollar of benefits to any of the Plaintiffs or to any other Plan beneficiary, do not alter these facts in any way. The courts below correctly recognized that there is no evidence in the record which could reasonably support a finding of breach of fiduciary duty by Murdock, a result entirely consistent with settled ERISA jurisprudence, and providing no ground for issuance of a writ by this Court.

II. The Disposition Below In No Way Departed From The Accepted And Usual Course Of Proceedings.

A. Plaintiffs Presented No Evidence Of Genuine Issues Of Material Fact.

In the context of claims of breach of fiduciary duty under ERISA, whether given actions do or do not constitute a breach of duty is an issue of law. *See, e.g., Hayes v. United States,* 899 F.2d 438, 443 (5th Cir. 1990) ("The existence and extent of a duty of care are questions of law"); *Johnston v. Holiday Inns, Inc.,* 595 F.2d 890, 895 (1st Cir. 1979) ("[W]hether certain acts constitute a breach of fiduciary duty is a question of law, not an issue of fact."). Thus, where, as here, the conduct undertaken by the fiduciary is not in dispute, whether such undisputed

conduct breaches duties under ERISA is a legal issue appropriate for resolution on summary judgment.

Plaintiffs do not point to specific facts of record which create a triable issue, but simply offer generalized accusations that the District Court "abdicated its responsibility" to analyze the "voluminous [unspecified] facts" which Plaintiffs say they presented. Petition at 20. Recourse to the record makes clear that it simply does not support Plaintiffs' overblown claims. *See supra* at 2-11.

Plaintiffs also rely heavily on the opinions of their two experts that Murdock and the Committee should have known in 1986 that there were problems which would lead to Executive Life's demise in 1991, claiming that these opinions were enough standing alone to defeat summary judgment. Petition at 13, 20-21.

If the mere fact that an expert reviews the factual record and opines that fiduciary standards were not met were enough to defeat summary judgment, then summary judgment would never again be granted against any plaintiff who has the minimal money and sense it takes to hire an expert to say that. The District Court properly refused to so eviscerate Rule 56. It recognized the well established rule that mere conclusory opinions of an expert, unsupported by competent record evidence, are insufficient to defeat summary judgment. *See, e.g., Tyger Construction Corp., Inc. v. Pensacola Construction Co.*, 29 F.3d 137, 145 (4th Cir. 1994), *cert. denied*, 115 S.Ct. 729, 130 L.Ed.2d 633 (1995); *Mid-State Fertilizer Co. v. Exchange National Bank of Chicago*, 877 F.2d 1333, 1339 (7th Cir. 1989) (experts can present "naked opinions," but

"[a]dmissibility does not imply utility"; where foundation facts are absent from record, expert opinion insufficient to create jury issue); *American Key Corp. v. Cole National Corp.*, 762 F.2d 1569, 1580 (11th Cir. 1985); *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 673 n. 27 (D.C. Cir. 1977).

What is pertinent, and what the District Court properly examined on summary judgment, was whether Plaintiffs or their experts offered not just opinions, but competent record evidence sufficient to raise a material issue of fact. The District Court was correct in concluding that they did not. To the contrary, Plaintiffs' experts relied almost exclusively on events and information which postdated the annuity purchase in mid-1986, and which therefore could not possibly have been considered by Murdock and the Committee. *See supra* at 7-9.

The Fourth Circuit's decision in *M & M Medical Supplies v. Pleasant Valley Hospital, Inc.*, 981 F.2d 160 (4th Cir. 1992), *cert. denied*, 508 U.S. 972, 113 S.Ct. 2962, 125 L.Ed.2d 662 (1993), deals with a different issue from that presented in this case. *M & M* concerned the *admissibility* of an expert's affidavit under Rule 56(e), F.R.Civ.P., holding that an affidavit which states the facts upon which an opinion is based is admissible even though the supporting data is not attached. 981 F.2d at 166. Here, the District Court did not hold the expert reports inadmissible. To the contrary, it received and analyzed those reports and the evidence which they purportedly relied on, and concluded that Plaintiffs and their experts "have not offered any evidence to support the opinion that Murdock and the Committee should have known of any problems at Executive Life in 1986." App. at A-35. That is precisely

why Rule 56 and *M & M* require an affidavit to recite the facts of record relied on, so that the court is in a position to evaluate whether the evidence actually supports the conclusory opinion offered. When it does not, the opinion, though admissible, is not sufficient to defeat summary judgment. *Mid-State Fertilizer Co., supra; Tyger Construction Co., Inc., supra.*

B. The Department Of Labor's Interpretation Of ERISA Is Irrelevant To This Case.

Plaintiffs argue at some length that the District Court and the Fourth Circuit were *required* to accept and apply the "safest available annuity" theory recently advanced by the Department of Labor. Petition at 20-24. Even if the DOL's new re-interpretation of 21-year-old statutory language could somehow be justified prospectively, the law certainly does not require the imposition of such a standard retroactively on conduct which occurred in 1986.

"Retroactivity is not favored in the law," *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208, 109 S.Ct. 468, 471, 102 L.Ed.2d 493 (1988), and "is contrary to fundamental notions of justice." *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855, 110 S.Ct. 1570, 1586, 108 L.Ed.2d 842, 865 (1990) (Scalia, J. concurring). As this Court stated in *Bowen*:

> The power to require readjustments for the past is drastic. It . . . ought not to be extended so as to permit unreasonably harsh action without very plain words. Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.

488 U.S. at 208-09. For these reasons, whether to grant or deny retroactive force to a new administrative interpretation is in each case a question of law, resolvable by reviewing courts with no overriding obligation of deference to the agency decision. *See, e.g., Retail, Wholesale and Department Store Union v. N.L.R.B.*, 466 F.2d 380, 389-90 (D.C. Cir. 1972); *Daughters of Miriam Center for the Aged v. Mathews*, 590 F.2d 1250, 1258-59 (3d Cir. 1978). Retroactivity is certainly inappropriate where, as with the DOL's new "interpretation" of ERISA, "[P]ersons could be held liable for the violation of standards which they properly believed were not applicable to them at the time of their acts." *Hughes v. Heyl & Patterson*, 647 F.2d 452, 454 (4th Cir. 1981).

The Fourth Circuit's refusal to apply the Department of Labor's novel theory retrospectively was plainly appropriate.

III. This Case Is Particularly Ill-Suited For Review On Certiorari Because Plaintiffs' Claims Should Be Barred By *Res Judicata*.

In October, 1986, a suit was commenced against Murdock and others which alleged, *inter alia*, breaches of fiduciary duties under ERISA in amending and terminating the Plan. *See Amalgamated Clothing & Textile Worker's Union, AFL-CIO v. Murdock*, 861 F.2d 1406 (9th Cir. 1988). The plaintiff union sought relief on behalf of all Plan participants, which included Plaintiffs here. Ultimately, the case was settled, JA 1057-71, and upon consent of all parties, a final judgment was entered dismissing the action with prejudice. *Id.*

The District Court rejected Murdock's plea of *res judicata*, App. at 30-31, and Murdock preserved the issue before the Fourth Circuit, which did not address it explicitly. The presence of such an issue which could be dispositive other than on the merits counsels against certiorari.

CONCLUSION

The old adage is that when fishing, one should fish where the fish are. The District Court and the Fourth Circuit have simply told the Plaintiffs that there are no fish here. Plaintiffs' disappointment is understandable, but unwarranted. Their Petition for a Writ of Certiorari should be denied.

Respectfully submitted this 3rd day of October, 1996.

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